No. 15204

United States Court of Appeals

For the Ninth Circuit

TORA UPSTEAD RYSTAD, *Appellant,*

vs.

JOHN P. BOYD, District Director Immigration and Naturalization Service, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

APPELLANT'S OPENING BRIEF

WARREN HARDY
Attorney for Appellant.

Office and Post Office Address:
1809 Northern Life Tower,
Seattle, Washington.

THE ARGUS PRESS, SEATTLE

No. 15204

United States Court of Appeals

For the Ninth Circuit

TORA UPSTEAD RYSTAD, *Appellant,*

vs.

JOHN P. BOYD, District Director Immigration and Naturalization Service, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

APPELLANT'S OPENING BRIEF

WARREN HARDY
Attorney for Appellant.

Office and Post Office Address:
1809 Northern Life Tower,
Seattle, Washington.

THE ARGUS PRESS, SEATTLE

INDEX

TABLE OF CASES

TEXTBOOKS

STATUTES

United States Court of Appeals

For the Ninth Circuit

TORA UPSTEAD RYSTAD, *Appellant,* vs. JOHN P. BOYD, District Director Immigration and Naturalization Service, *Appellee.*	No. 15204

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

The jurisdiction of the District Court is conferred by the provisions of Sec. 1331, Title 8 U.S.C.A., and of this court by Sec. 1291, Title 28, U.S.C.A.

STATEMENT

Appellant is a citizen of Norway, having been born there July 1st, 1909, and has resided continuously in the United States of America since May 31st, 1928. She now lives in Seattle, Washington, is married to a United States citizen and has two children. She is a housewife.

On July 16th, 1954, appellant was arrested by direction of appellee upon a charge of being unlawfully in the

United States under the Immigration and Nationality Act of 1952, in that she was, after entry, an alien who was a member of the Communist Party of the United States, as set forth in Section 241 (a) of said Act.

After a hearing before a Special Inquiry Officer acting under the direction of the appellee, at which hearing appellant did not take the stand and testify, said Inquiry Officer made a written opinion and decision that appellant was an alien and that in 1945 and 1946. she had been a member of the Communist Party of the United States, and ordered her deported. He based his decision and order solely upon the testimony of Fred L. Thornburgh and upon an inference he drew adverse to appellant because of her failure to testify.

Thereafter appellant obtained other counsel than her original lawyer, or her present attorney, and moved to reopen the matter for further testimony and filed appellant's affidavit that she was not, and never had been a member of the Communist Party of America. The motion was denied. She appealed to the Board of Immigration Appeals and it denied her appeal, and later her motion to Reopen.

Appellant then brought habeas corpus proceedings, and the writ was denied and the petition dismissed by the Honorable William J. Lindberg, Judge of the District Court.

APPELLANT'S POINTS ON APPEAL

1. That the court erred in finding as a matter of fact (Paragraph VIII Findings of Fact):

> "That the hearing officer found as a matter of fact that the petitioner is an alien, a native and citizen of Norway; that after entry at New York on May 31, 1928, at which time she was admitted for permanent residence, she was a member of the Communist Party of the United States at Seattle, Washington, in 1945 and 1946, for the reason that said findings were not supported by the evidence."

2. That the court erred in concluding, as a matter of law (Paragraph I):

> "That the deportation proceedings and the Motion to Reopen and administrative action pertaining thereto were judicially reviewed by the United States District Court for the Western District of Washington, Northern Division, in Cause No. 3986; that the court found (properly) that the record of administrative proceedings to be supported by reasonable, substantial and probative evidence, and that there was no denial of due process to the petitioner herein. That the judgment of the court in Cause No. 3986 is final and determinative of the issues presented therein."

3. That the court erred in concluding as a matter of law (Paragraph 2):

> "That the order of the Board of Immigration Appeals dated January 25th, 1956, denying appellant's 'Renewal of Motion to Reopen' did not deny petitioner due process, nor render the hearing unfair."

4. That the court erred in concluding, as a matter of law (Conclusion No. 3):

"That respondent is entitled to an order dismissing the petition and quashing the order to show cause."

5. That the court erred in making and entering its Order:

"That the petition in this cause be and the same hereby is, denied, and the rule to show cause heretofore issued discharged."

THE EVIDENCE

The only witness upon behalf of appellee was Fred L. Thornburgh who testified that he was an informer, paid by the Federal Bureau of Investigation solely upon the basis of the names of alleged communists and their activities (R. 8), from 1942 until he terminated his membership in the Communist Party and quit working as a paid spy early in 1947 (R. 8). He identified appellant as a member from early in 1945 until he quit, and claimed to have given her membership stamps. On cross-examination he could not remember any details about the time and place of giving these stamps, or when and where he saw appellant at any meetings, or whether they were open meetings or closed ones where only communists could attend.

THE LAW

It is admitted that appellant is an alien, and that if she was a member of the Communist Party of the United States at the time stated, that she is subject to deportation.

ARGUMENT

Appellant contends that no inference adverse to her, should have been drawn by the Special Inquiry Officer. The burden was on appellee to prove that she was subject to deportation. But, if for the sake of argument, it is conceded that such is the law, then the action of the appellee in denying her the right to reopen the case and testify in accordance with her sworn affidavits, that she was not a communist and never had been, was a denial of legal rights, and the District Court erred in not so holding.

Appellant adopts the law cited by the Special Inquiry Officer as the definition of substantial evidence. Mr. Justice Hughes in *Consolidated Edison v. N. L. R. B.,* 307 U.S. 197, says:

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Manifestly the evidence of Thornburgh does not rise to this dignity. The inference from his testimony is inescapable. He said that he had no other reason than money in working as an informer, and that he was paid for names and information. He had a direct financial reason for turning in appellant's name, and his failure to remember any detail whatsoever supports no other theory than that his testimony about her membership and giving her membership stamps was false. He had taken the Federal Bureau of Investigation's money, and had to testify to what he did to escape admitting he had procured it under false pretenses. His imagination went no further than the bare outlines of a story.

The testimony of paid spies and informers comes from a very polluted source. Counsel feels that he is unable to comment upon it with the force and truth of what Lord Erskine said in his defense of Thomas Hardy, when in turn he quoted the eminent Englishman, Mr. Burke. It is as follows:

> "A mercenary informer knows no distinction. Under such a system the obnoxious people are slaves, not only to the government, but they live at the mercy of every individual; they are at once the slaves of the whole community, and of every part of it; and the worst and most unmerciful men are those on whose goodness they most depend.
>
> "In this situation men not only shrink from the frowns of a stern magistrate, but are obliged to fly from their very species. The seeds of destruction are sown in civil intercourse and in social habitudes. The blood of wholesome kindred is infected. The tables and beds are surrounded with snares. All means given by Providence to make life safe and comfortable, are perverted into instruments of terror and torment. This species of universal subserviency that makes the very servant who waits behind your chair, the arbiter of your life and fortune, has a tendency to debase and degrade mankind, and to deprive them of that assured and liberal state of mind which alone can make us what we ought to be, that I vow to God, I would sooner bring myself to put a man to death for opinions I disliked, and so to get rid of the man and his opinions at once, than to fret him with a feverish being, tainted with the jail distemper of a contagious servitude to keep him above ground, an animated mass of putrefaction, corrupting himself, and corrupting all about him."

In addition to the above it must be remembered that the statute of limitations is founded upon a wise provision of law. In the State of Washington, where this matter was tried, all prosecutions for crimes, except treason and murder, are barred by a three-year limitation. Old evidence is unreliable. Thornburgh was testifying to matter over nine years old, and for that very reason it would not support a conviction for any common crime or a judgment for a debt. How can such testimony be held to be substantial? If it were on a charge of treason or murder, would it be enough to hang a person?

This is a serious situation. This wife and mother is being threatened with being taken from her husband and children and sent back to a country she left in 1928.

The question is not whether the appellee's officer believed Thornburgh. It is as to whether or not the discredited testimony of a paid spy and informer concerning something he claims happened so long ago is substantial evidence in a court of law. If it is, the District Court was right in denying the petition for a writ of habeas corpus, if it is not, then that court was in error and the case should be reversed.

Respectfully submitted,

Warren Hardy
Attorney for Appellant.